

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs November 28, 2006

**STATE OF TENNESSEE v. ROBERT CLARENCE PAYNE**

**Appeal from the Criminal Court for Davidson County**  
**No. 2004-A-819    Seth Norman, Judge**

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**No. M2006-01662-CCA-R3-CD - Filed January 11, 2007**

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Appellant, Robert Clarence Payne, was indicted by the Davidson County Grand Jury for two counts of felony murder, one count of attempted aggravated robbery and two counts of aggravated assault. On January 19, 2006, the defendant, through counsel, entered a guilty plea to the attempted aggravated robbery charge, a Class C felony, and received a sentence of fifteen years as a Range III, persistent offender as provided by the plea agreement. Also included in the agreement was that the sentence was to be served consecutive to the defendant's sentences in other cases. On April 21, 2006, the defendant filed a motion to modify his sentence pursuant to Tenn. R. Crim. P. 35(b), citing health and family reasons as his basis for the modification. The trial court denied the motion. Following our review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which DAVID G. HAYES and ALAN E. GLENN, JJ., joined.

Robert Clarence Payne, Nashville, Tennessee, Pro Se.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; Victor S. (Torry) Johnson, III, District Attorney General; Dan Hamm, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The defendant, Robert Clarence Payne, appeals the trial court's denial of motion to modify his sentence. He received a sentence of fifteen years as a Range III persistent offender pursuant to his agreed plea to attempted aggravated robbery. The defendant filed a motion to reduce his sentence pursuant to Rule 35(b) of the Tennessee Rules of Criminal Procedure. Defendant alleged that he was entitled to a reduction of his sentence because the mother of his five children had died and he was now required to care for them. Additionally, he alleged that he suffered from a serious illness and, in the interest of justice, should be placed in a community corrections program in order to seek

medical treatment through the Veteran's Administration Hospital. The trial court denied the defendant's motion without a hearing. Tenn. R. Crim. P. 35(c).

### ANALYSIS

Rule 35(a) of the Tennessee Rules of Criminal Procedure provides that a defendant may petition the trial court for a reduction of sentence within one hundred and twenty days of the entry of judgment or revocation of probation. Rule 35 allows for the modification of a sentence when appropriate in the interest of justice. State v. Hodges, 815 S.W.2d 151, 154 (Tenn. 1991). When a defendant seeks to modify a sentence entered pursuant to a guilty plea, a motion should be granted when post-sentencing developments arise that should be addressed in the interest of justice. State v. McDonald, 893 S.W.2d 945, 947 (Tenn. Crim. App. 1994). Alternatively, a motion for reduction of sentence may be dismissed summarily without a hearing if no developments have arisen requiring redress by the sentencing court. Tenn. R. Crim. P. 35(c). Our standard of review on appeal is whether the trial court abused its discretion in denying a defendant's motion for reduction of sentence. State v. Irick, 861 S.W.2d 375, 376 (Tenn. Crim. App. 1993), perm. app. denied (Tenn. 1995).

The record shows that the defendant was initially indicted for two counts of felony murder, one count of attempted aggravated robbery and two counts of aggravated assault. The offenses all occurred on September 27, 2003. Pursuant to the plea agreement, the felony murder counts and aggravated assault counts were dismissed and judgment was entered for the attempted aggravated robbery count on January 19, 2006. The defendant alleged in his motion that he has remained incarcerated since his arrest for these and other offenses on October 2, 2003. He further alleged that he suffers from a serious illness and was suffering from that illness when the offenses occurred in 2003.<sup>1</sup> He also alleged that his incarceration caused an extreme hardship on his five minor children whose mother had died and were now in the custody of his cousin. Additionally, we note that the defendant admits in his brief that the mother of his children died of a drug overdose on November 16, 2004, while he was in custody pending disposition of his cases.

As previously stated, a motion to reduce sentence should be granted when, in the interest of justice, post-sentencing facts arise warranting a reconsideration of a defendant's sentence. McDonald at 947. It is apparent from this record that no new developments have occurred. Based upon the defendant's allegations in his motion as well as his admissions on appeal, the alleged health and family concerns were present at the time of sentencing. Indeed, this court could presume that these facts were considered in arriving at his plea agreement. For these reasons, the court finds that the trial court did not abuse its discretion in denying the defendant's motion for reduction of sentence.

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<sup>1</sup> For the first time in his brief, the defendant alleges that he is being subjected to cruel and unusual treatment by the Department of Correction due to medication prescribed for a positive tuberculosis diagnosis. This allegation was not made at the trial court level and is deemed waived. Furthermore, it would not warrant relief pursuant to Rule 35.

### CONCLUSION

The defendant's motion for reduction of sentence raised no new facts warranting reconsideration of the his sentence. The trial court did not abuse its discretion in denying the defendant's motion. The judgment of the trial court is affirmed.

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D. KELLY THOMAS, JR., JUDGE